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Petition and Transcript of Record

Supreme Court of the United States

OCTOBER TERM, 1929

No. 93

ANITA H. COOPER, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED MAY 17, 1929

CERTIORARI GRANTED OCTOBER 14, 1929

(34,215)

(34,215)

SUPREME COURT OF THE UNITED STATES

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No. 906

ANITA H. COOPER, PETITIONER,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
Petition for writ of certiorari	1	1
Record from Court of Claims	1	5
Petition	1	5
Exhibit "A"—Claim for refund	6	8
General traverse	7	10
History of proceedings	7	10
Special findings of fact	8	11
Conclusion of law	9	13
Judgment	10	13
Clerk's certificate (omitted in printing)	11	
Order allowing certiorari		15

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 20, 1929

[fol. 1]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 906

ANITA H. COOPER, Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioner, Anita H. Cooper, by her counsel prays that a writ of certiorari issue to the United States Court of Claims directing that court to certify to this court the record in the case of *Anita H. Cooper v. United States of America*, No. H-32 in that court, in order that the judgment of said court rendered on May 6th, 1929, may be reviewed.

Statement of the Case

This suit was to recover income taxes for the year 1921, alleged to have been erroneously and illegally collected and a claim for refund of which had been denied.

The findings of the Court of Claims show that the petitioner, a citizen of the United States and a resident of New York, duly filed her income tax return for the calendar year 1921, and paid the tax shown thereon to be due. In the taxable income reported on the return there was included the sum of $36,670, as a gain derived from the sale on November 7, 1921, of 380 shares of the capital stock of New York County National Bank. These 380 shares of stock were acquired by the petitioner on November 1, 1921, by gift from her husband. At the time the stock was acquired [fol. 2] by the petitioner its fair market value was $210 per share. The petitioner's husband had purchased the stock in 1918 at a cost of $113.50 per share. The stock was sold by the petitioner at a price of $210 a share. In reporting a gain of $36,670 on this transaction, the petitioner followed the provisions of Section 202 (a) (2) of the Revenue Act of

1921, that is to say, the basis used by the petitioner was the cost of the stock to her husband, and the gain reported was the difference between the cost to her husband and the price at which the stock was sold by the petitioner. By reason of the provisions of Section 202 (a) (2), the petitioner was required to pay $8,474.90 more in tax than she would have been required to pay if in computing gain or loss on the said sale she had been permitted to use as a basis the fair market value of the stock at the time it was acquired by her.

The Court of Claims overruled the petitioner's contentions, (1) that the proper basis for determining gain or loss on the foregoing sale was the fair market value of the stock at the time it was acquired by the petitioner, and, (2) that Section 202 (a) (2) of the Revenue Act of 1921 was unconstitutional and void, insofar as it purported to require the petitioner to use as a basis the cost of the stock to her husband. The Court of Claims dismissed the petition, deciding as a conclusion of law that the petitioner was not entitled to recover the tax in issue, and citing as authority for such conclusion this court's decisions in *Taft v. Bowers* and *Greenway v. Bowers,* 49 S. Ct. 199.

[fol. 3] The Statute

Revenue Act of 1921, 42 Stat. 227

"Basis for Determining Gain or Loss

Sec. 202 (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal, or mixed, acquired after February 28, 1913, shall be the cost of such property; except that * * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. * * * In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sale or other disposition thereof shall be the fair market price or value of such property at the time of such acquisition;"

The Issue

In the case of property acquired by gift and sold prior to the enactment of the Revenue Act of 1921, is the basis for determining gain or loss on such sale the cost of the property to the donor or the fair market value of the property at the time of such acquisition?

Reasons for Granting the Petition

In the view of the petitioner the Court of Claims erred in deciding as a conclusion of law that the petitioner is not entitled to recover and, in effect, holding that the issue here presented is controlled by the decision of this court in the cases of *Taft v. Bowers* and *Greenway v. Bowers,* 48 S. Ct. 199, notwithstanding the transactions here in question were completed prior to the enactment of the Revenue Act of 1921.

In the present case both the gift to the petitioner and the sale by the petitioner took place prior to the enactment of the Revenue Act of 1921. Section 202 (a) (2) must be [fol. 4] given retrospective operation if it is applicable to the gift and sale here in question.

The gifts and the sales considered in *Taft v. Bowers* and *Greenway v. Bowers* all occurred after the passage of the 1921 Act and in those cases the retroactive effect of Section 202) (a) (2) was not passed upon.

This court has held repeatedly that a taxing statute should not be construed to apply to transactions completed when the Act became law, unless that intention be clearly declared; that such a statute should not be given a retrospective operation unless its words make that imperative. *Shwab vs. Doyle,* 258 U. S. 529; *Levy v. Wardell,* 258 U. S. 542.

It cannot be said that the language of the Revenue Act of 1921 requires that Section 202 (a) (2) be applied to a transaction which was completed before the Act became law.

This court has also declared repeatedly that a statute purporting to lay a tax may be so arbitrary and capricious that its enforcement amount to deprivation of property without due process of law within the inhibition of the Fifth Amendment. *Nichols v. Coolidge,* 274 U. S. 531; *Blodgett*

v. Holden, 48 Sup. Crt. Rep. 105; *Untermyer v. Anderson*, 48 Sup. Crt. Rep. 353.

In its opinion in *Taft v. Bowers* this court, referring to the donee of the stock involved in that case, said:

"By requiring the recipient of the entire increase to pay a part into the public treasury, Congress deprived her of no right and subjected her to no hardship. *She accepted the gift with knowledge of the statute and, as to the property received, voluntarily assumed the position of her donor. When she sold* the stock she actually got the original sum invested, plus the entire appreciation and out of the latter only was she called on to pay the tax demanded. [fol. 5] The provision of the statute under consideration seems entirely appropriate for enforcing a general scheme of lawful taxation. To accept the view urged in behalf of petitioner undoubtedly would defeat, to some extent, the purpose of Congress to take part of all gain derived from capital investments. To prevent that result and insure enforcement of its proper policy, Congress had power to require that for purposes of taxation the donee should accept the position of the donor in respect of the thing received. *And in so doing, it acted neither unreasonably nor arbitrarily.*" (Italics supplied.)

The petitioner in the present case did not accept the gift with knowledge of the statute, because the statute was not enacted until some three weeks after the gift in question. It cannot be said that she voluntarily assumed the position of her donor.

Congress, in requiring that the donee should accept the position of the donor in respect of the thing received, *must act reasonably and not arbitrarily.*

In *Blodgett v. Holden*, supra, this court, holding that a tax on gifts made prior to the enactment of the 1924 Act was arbitrary and invalid, said:

"It seems wholly unreasonable that one who, in entire good faith and without the slightest premonition of such consequence, made absolute disposition of his property by gifts should thereafter be required to pay a charge for so doing."

In the instant case the transactions which gave rise to the disputed tax were wholly completed before the statute in question became law. It is submitted that insofar as it purports to require the petitioner in this case to assume the position of her donor, the statute is arbitrary, unreasonable and invalid.

Wherefore it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United [fols. 6 & 7] States Court of Claims should be granted.

Wayne Johnson, Counsel for Petitioner, 50 Broadway, New York, N. Y.

[fol. 1] IN COURT OF CLAIMS OF THE UNITED STATES

No. H-32

ANITA H. COOPER

vs.

UNITED STATES OF AMERICA

I. PETITION—Filed Jan. 28, 1927

To the Court of Claims of the United States and to the Honorable the Judges thereof:

The above named claimant, by Johnson & Shores, her attorneys, by this her petition, respectfully shows:

1. The claimant at all times herein mentioned was and is a citizen of the United States and of the State of New York, residing at the Ritz-Carlton Hotel, New York, N. Y.

2. The claimant has a just claim for the refund of $8,474.90 paid by her to the United States of America as income taxes for the calendar year 1921.

3. Pursuant to the requirements of Section 223 and 227 of the Revenue Act of 1921, the claimant, on March 14, 1922, duly filed her income tax return for the calendar year 1921.

[fol. 2] On said return claimant's taxable net income was stated to be $51,561.70 and the total tax due thereon was shown to be $9,618.04.

4. In accordance with the provisions of Section 250 (a) of the Revenue Act of 1921 said total tax of $9,618.04 was paid to the Collector of Internal Revenue for the Second District of New York, in four installments as follows:

$2,404.51 paid on March 14, 1922.
$2,404.51 " " June 14, 1922.
$2,404.51 " " Sept. 15, 1922.
$2,404.51 " " Dec. 15, 1922.

On information and belief, the claimant alleges that the said total tax of $9,618.04, paid to the Collector as aforesaid, was thereafter by the said Collector turned over and deposited into the Treasury of the United States of America as in the course of his official business.

5. In the taxable net income of $51,561.70 reported on the return, as aforesaid, there was included the sum of $36,-670.00 as gain derived by claimant from the sale in 1921 of 380 shares of the capital stock of New York County National Bank, a corporation organized under the laws of the United States, doing business in the State of New York.

6. Said shares of stock were acquired by claimant in 1921 by absolute gift from claimant's husband, Oscar Cooper.

7. At the time said shares of stock were acquired by claimant as aforesaid the fair market value thereof was $210 per share.

[fol. 3] 8. Claimant's husband acquired said shares of stock in 1918 by purchase, paying therefor $113.50 per share.

9. Claimant sold said shares at a price of $210 per share.

10. In determining her taxable net income reported on her return as aforesaid, the claimant computed her gain on the sale of said shares of stock in accordance with the requirements of Section 202 (a) (2), of the Revenue Act of 1921, that is to say, the basis used was the cost of said shares to Oscar Cooper and the gain reported, namely $36,-670.00, was the difference between the cost of said shares to said Oscar Cooper to wit, $113.50 per share, and the price at which said shares were sold by claimant, to wit $210 per share.

11. Claimant contends that the requirements of said Section 202 (a) (2) are unconstitutional and void and that the proper basis for determining the gain derived by claimant from the sale of said shares of stock was the fair market value of said shares at the time same were acquired by her to-wit, $210.00 per share.

12. By reason of the requirements of the said Section 202 (a) (2), the claimant was required to pay $8,474.90 more in tax than she would have been required to pay if the basis for determining gain on said sale was the fair market value of said shares at the time said shares were acquired by claimant.

13. On September 15, 1926, claimant duly filed a claim for refund of said difference in tax to-wit $8,474.90. A true copy of said claim for refund marked Exhibit A is attached hereto and made a part thereof.

[fol. 4] 14. The Commissioner of Internal Revenue wholly rejected said claim for refund on November 30, 1926, and the sum of $8,474.90 is now wrongfully and unlawfully retained and withheld from the claimant without her consent and against her will by the United States of America.

15. No other action than as aforesaid has been had on this claim in Congress, or in any of the Departments. The claimant has at all times borne true allegiance to the Government of the United States. She has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government. She is and always has been the sole and absolute owner of the claim here presented. She has made no transfer or assignment of said claim, nor of any part thereof, nor of any interest therein. She is justly entitled to the amount claimed from the United States of America after allowing all just credits and offsets.

16. Claimant believes the facts as herein stated to be true.

Wherefore the claimant prays for judgment against the United States of America upon the facts and the law for $8,474.90, together with interest thereon from December

15, 1922, and her reasonable costs and disbursements herein.

Wayne Johnson, Johnson & Shores, Attorneys for Claimant. Office & P. O. address: 100 Broadway Borough of Manhattan, City of New York.

[fol. 5] *Duly sworn to by Anita H. Cooper. Jurat omitted in printing.*

[fol. 6] EXHIBIT "A" TO PETITION

Form 843—Jan., 1922

Treasury Department, Internal Revenue Service, Comptroller General U. S., January 18, 1922

(Execute Separate Form for Each Tax Period)

Claim for Abatement of Tax Assessed, Credit Against Outstanding Assessments, X Refund of Taxes Illegally Collected, Refund of Amounts Paid for Stamps Used in Error or Excess

Collector's Notation: District, ——; Account number, ——; Date received, ——. Stamp here: —— ——, Collector of Internal Revenue.

Important.—File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

Notice to Collector.—Collector must indicate in block above the kind of claim, except in Income Tax cases.

Date received by Administrative Unit: Stamp here: —— —, ——.

STATE OF NEW YORK,
County of New York, ss:

(Name of taxpayer or purchaser of stamps:) Anita H. Cooper.

(Residence—give street and number as well as city or town and State:) Ritz-Carlton Hotel.

(Business address:) New York, N. Y.

This deponent, being sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged: ——. Period: From Jan. 1, 1921 to Dec. 31, 1921.

2. (State for or upon what the tax was assessed or the stamps affixed.) Character of assessment or tax—Income Tax.

3. Amount of assessment or stamps purchased $9,618.04

4. Reduction of Tax Liability requested (Income and Profits Tax) 8,474.90

5. Amount to be abated .....

6. Amount to be refunded (or such greater amount as is legally refundable) 8,474.90

7. Dates of payment (see Collector's receipts or indorsements of canceled checks)—Mar.-June-Sept.-Dec., 1922.

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed—Second, N. Y.

9. District in which unpaid assessment appears: ——

10. Amount of overpayment claimed as credit $.....

11. Unpaid assessment against which credit is asked; period from —— —, —— to —— —, —— $.....

Deponent verily believes that this application should be allowed for the following reasons:

There was included in the taxable income reported on claimant's return, as taxable profit derived from the sale of 380 shares of stock of New York County National Bank, an amount computed on a basis of $113.50 per share, in accordance with the requirements of Section 202 (a) (2) of the Revenue Act of 1921.

Said shares of stock were donated to claimant during the year 1921 by her husband, Oscar Cooper, and said basis of $113.50 per share was the same basis as should have been used had the said Oscar Cooper sold said shares.

Claimant protests the constitutionality of said Section 202 (a) (2) of the Revenue Act of 1921 and contends that the proper basis for determining the taxable profit derived by her from the sale of said shares of stock was their fair

market value at the time they were so donated to her, to wit, $210.00 per share.

Accordingly claimant demands the refund of $8,474.90, same being the difference in tax by reason of the computation of profit in accordance with said Section 202 (a) (2) instead of on a basis of fair market value of $210.00 per share.

(Attach additional sheets if necessary.)

(Signed:) Anita H. Cooper, by Oscar Cooper, Atty.

Sworn to and subscribed before me this 28th day of August, 1926. L. I. Hueston, Notary Public, Kings County No. 331. Certificate filed in New York, County No. 78. Kings County Register's No. 799. New York County Register's No. 7130. (Seal.)

(This affidavit may be sworn to before a Deputy Collector of Internal Revenue or Revenue Agent without charge.)

[fol. 7] II. General Traverse—Filed March 29, 1927

And now comes the Attorney General, on behalf of the Untied States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Herman J. Galloway, Assistant Attorney General.

O. K. A. H. McC.

III. History of Proceedings

On January 15, 1929, this case was submitted on merits, on stipulation of parties, without argument, by Messrs. Johnson & Shores, for plaintiff, and by Mr. Leslie A. Smith, for defendant.

On March 11, 1929, the court filed an order dismissing the plaintiff's petition.

On April 17, 1929, the plaintiff filed a motion requesting the court to file findings of fact.

On May 6, 1929, said motion was allowed and special findings of fact and conclusion of law were filed, which are as follows:

[fol. 8] IV. **Special Findings of Fact and Conclusion of Law**—Filed May 6, 1929

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

SPECIAL FINDINGS OF FACT

I

Plaintiff, Anita H. Cooper, is a citizen of the United States and a resident of the city of New York, N. Y., and has at all times borne true allegiance to the Government of the United States and has not in any way aided, abetted, or given encouragement to rebellion against the said Government.

II

On March 15, 1922, plaintiff filed her Federal income-tax return for the calendar year 1921, in which her net taxable income was stated to be $51,561.70, and the total tax due thereon was shown to be $9,618.04.

III

Plaintiff paid said tax of $9,618.04 to the collector of internal revenue for the second district of New York in four equal installments of $2,404.51 each on March 15, June 17, September 19, and December 18, 1922, respectively, which sums were thereafter turned over and deposited into the Treasury of the United States.

IV

In the taxable net income of $51,561.70 reported by plaintiff on her return as aforesaid there was included the sum of $36,670.00 as a gain derived by plaintiff from the sale in 1921 of 380 shares of the capital stock of the New York County National Bank, a corporation organized under the

laws of the United States and doing busines in the State of New York.

[fol. 9] V

Said 380 shares of stock were acquired by the plaintiff on November 1, 1921, by absolute gift from her husband, Oscar Cooper. At the time said shares of stock were acquired by plaintiff from her husband, the fair market value was $210 per share. Plaintiff's husband acquired said shares of stock during the year 1918 by purchase at a cost of $113.50 per share. Plaintiff sold said shares of stock on November 7, 1921, at a price of $210 per share.

VI

In determining her taxable net income reported as aforesaid plaintiff computed her gain on the sale of said shares of stock in accordance with the requirements of section 202 (a) (2) of the revenue act of 1921—that is to say, the basis used was the cost of the said shares to her husband, Oscar Cooper, to wit, $43,130, and the gain reported, namely, $36,670, was the difference between the cost of said shares to said Oscar Cooper and the price at which the said shares were sold by plaintiff, to wit, $79,800.

VII

By reason of the requirements of said section 202 (a) (2) of the revenue act of 1921 plaintiff was required to pay $8,474.90 more in tax than she would have been required to pay if in determining the gain on said sale she had been permitted to use as a basis the fair market value of said shares at the time they were acquired by the plaintiff.

VIII

On September 15, 1926, the plaintiff filed a claim for refund of said tax of $8,474.90 with the Commissioner of Internal Revenue. A copy of said claim for refund marked "Exhibit A" is attached to the petition herein and is made a part of this finding by reference. On November 30, 1926, the commissioner rejected said claim for refund in full.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides as a conclusion of law that plaintiff is not entitled to recover, and her petiton is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record in this cause, the amount thereof to be ascertained by the clerk and collected by him.

See cases of Taft and Greenway v. Bowers, Collector, decided by the Supreme Court February 18, 1929.

[fol. 10] JUDGMENT

At a Court of Claims held in the City of Washington on the 6th day of May, A. D. 1929, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and her petition is therefore dismissed.

See cases of Taft and Greenway v. Bowers, Collector, decided by the Supreme Court February 18, 1929.

[fol. 11] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,215. Court of Claims. Term No. 906. Anita H. Cooper, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed May 17th, 1929. File No. 34,215.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1929

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.